United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL WITH PROOF OF SERVICE

77-7217

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

MAGNALEASING, INC.,

Plaintiff-Appellee,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP., and TOTTENHAM REALTY CORP.,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE MAGNALEASING, INC.

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Defendants-Appellants.

----------x

BRIEF FOR APPELLEE MAGNALEASING, INC.

Preliminary Statement

This brief is submitted on behalf of Plaintiff-Appellee, Magnaleasing, Inc. ("Magnaleasing"). This diversity action was brought to obtain rescission of Magnaleasing's lease at a shopping center, the Staten Island Mall ("Mall"), and to recover damages on the ground that defendants had fraudulently induced Magnaleasing to enter into its lease. After a three day trial to the court, Judge Lloyd F. MacMahon, applying New York law, determined that defendants' leasing agent, to induce Magnaleasing to enter into its lease, had deliberately misrepresented the rate and volume of leasing at the Mall and had also deliberately misrepresented its estimates of common area and real estate tax charges. Magnaleasing, Inc. v. Staten Island Mall, 428 F. Supp. 1039 (S.D.N.Y. 1977) Judge MacMahon found these misrepresentations to be material and that Magnaleasing justifiably relied upon them in entering into its lease. Judge MacMahon rescinded the lease and ordered a reference on damages

before Magistrate Martin D. Jacobs as Special Master, which reference resulted in an award to Magnaleasing of damages in the amount of $156,769.99 together with costs and interest.

Issues Presented for Review

Magnaleasing does not object to defendants' statement of the first, third, and fourth issues. The second, fifth, and sixth issues should be restated as follows:

> 2. Was the district court clearly wrong in refusing to dismiss the action as a matter of law?
>
> 5. Did the district court abuse its discretion in rejecting defendants' affirmative defenses of laches and waiver?
>
> 6a. Did the district court err in determining that defendants waived their objection to the reference by consenting to the judgment directing the reference and by failing to object to the trial judge prior to the determination of damages by the special master?
>
> 6b. Did the district court abuse its discretion in directing a reference on damages?

STATEMENT OF CASE

Introduction

On April 26, 1973 Magnaleasing entered into a fifteen year lease with defendants to rent a store at the Mall. Pursuant to the lease Magnaleasing was to pay base rent, its pro rata share of real estate tax and common area charges and miscellaneous expenses. The lease was the culmination of negotiations which commenced in the fall of 1972 between Magnaleasing and Feist & Feist, the leasing agent for the Mall. During the course of these negotiations, Feist & Feist made the following oral and written misrepresentations:

(a) that in August 1972 the Mall was more than 50% leased and that by December 1972 the Mall was about 90% leased;

(b) that defendants' estimate of real estate tax charges on the Mall as fully assessed was $1.25 per square foot per annum with the landlord to pay the first $.25; and

(c) that defendants' estimate of common area charges at the Mall was $.60 per square foot per annum.

Each representation was false at the time it was made. Defendants knew that only 15% of the Mall was leased when they said it was 50% leased; and that only 30% was leased when they said it was about 90% leased. Defendants knew that their estimate of common area charges to be paid by Magnaleasing was over $2.00 per square foot when they told Magnaleasing their estimate was only $.60 per square foot. When defendants told Magnaleasing their estimate of real estate tax charges was $1.00 per square foot, they knew that their estimate of the real estate tax charge to be paid by Magnaleasing was over $2.00 per square foot for the first year and over $4.00 per square foot thereafter. Magnaleasing relied on these representations and entered into the lease. After Magnaleasing took occupancy, it discovered that the Mall was almost half empty and that its common area and tax charges were over $2.50 and $5.00 per square foot respectively.

Parties

Magnaleasing is a wholly owned subsidiary of the Magnavox Company. John Kelly is vice president of Magnaleasing and an assistant secretary of the Magnavox Company. He negotiated and executed the lease on behalf of Magnaleasing. (A

165)* Dale Kelly was the Magnavox zone manager and Darryl Laxon was a Magnavox regional sales manager. (Joint Statement of Stipulated and Disputed Facts, PX 1, hereinafter designated as "JS" ¶35 at E7) All three of Magnaleasing's employees were present when the oral misrepresentations were made. (JS ¶29 at E6)

Defendant Staten Island Mall, which is a joint venture comprised of defendants, Blackfriars Realty Corp. and Tottenham Realty Corp., owns the Mall. The Mall is an enclosed, two tiered, climate controlled shopping center with 420,000 square feet of leasable store space. (A55, PX 3 at E48) It is located between and connected to two department stores: Macy's on one end and Sear's on the other. (A49, PX 3 at E48)

Feist & Feist was the developer of the Mall and its managing and leasing agent. (JS ¶9 at E2) Irving Feist was president of Feist & Feist as well as president of Blackfriars and Tottenham. (A88) John Feist was vice president of Feist & Feist, Blackfriars and Tottenham. (A44) He was in charge of the leasing program at the Mall, (JS ¶72 at E18) and primarily responsible for its operation and maintenance. (A157, 158) George Kirtland is, and was at the time of trial, an employee of Feist & Feist and a licensed real estate salesman. (JS ¶26

* References to Volumes I and II of the Appendix (containing miscellaneous Court papers and the trial transcript, respectively) will be preceded by the letter "A"; references to Volume III of the Appendix (containing the transcript of the damages reference before the special master) will be preceded by the letter "D". References to plaintiff's exhibits will be preceded by "PX" and to defendants' exhibits by "DX". Unless otherwise specified, all such references are to exhibits offered at the trial before the Court. Page references to materials contained in the Exhibit Volume will be preceded by the letter "E".

at E5) Kirtland negotiated the lease on defendants' behalf. (JS ¶20 at E4) Donald Faughnan, a certified public accountant, was the controller of Feist & Feist from 1971 until 1974. (A156) Ed Fraher, an employee of Feist & Feist, was in charge of construction of the Mall. (A98)

Facts Relating to the Misrepresentations

On November 2, 1972, John Kelly wrote to Feist & Feist about the prospect of leasing space at the Mall. (JS ¶31 at E6) In response to that letter and a subsequent telephone conversation, George Kirtland wrote a letter, dated November 16, 1972, enclosing two advertising brochures, dated August 1972 and November 1972. (JS ¶32 at E7, PX 2 at E46, PX 3 at E48) The August brochure stated: "More than 50 percent of the space at Staten Island Mall has been leased by local and national chains." (PX 2 at E46) The November 1972 brochure likewise stated: "Feist & Feist, developers of the mall with associated investors, said that leasing has surpassed the 50 percent mark." (PX 3 at E48)

On December 4, 1972, a meeting was held at the Mall site by representatives of Magnaleasing and defendants. Present at this meeting were John Kelly, Dale Kelly and Darryl Laxon for Magnaleasing and George Kirtland for defendants. (JS ¶35 at E7, 8) Kirtland gave Dale Kelly copies of the August and November advertising brochures, which contained the declarations that the Mall was already more than 50% leased. (A17) He also produced two leasing plans, dated October 18, 1972, prepared by Feist & Feist; one for the first floor of the Mall and the other for the second floor. (A20, 167, PX 20, 21) The leasing

plans were floor plans which designated each of the rentable spaces.

The uncontroverted testimony is that Kirtland told Dale and John Kelly that the Mall was practically all leased. (A19, 169) According to Dale Kelly, Kirtland said the Mall was now about 90% leased. (A19) Kirtland also said that Magnaleasing was very fortunate as there were only one or two spaces left of the size Magnaleasing required. (A19-20, 249) To support his representations about the level of occupancy, Kirtland showed Dale and John Kelly the leasing plans and indicated which tenants had leased space thus far. The leasing plans contained store locations. The names of tenants, who had purportedly leased space, were printed in the locations. (A30, 248-249, PX 20, 21) Over 60% of the rentable space at the Mall was designated as leased to named tenants. Kirtland also told John Kelly that additional spaces were leased which were not indicated on the leasing plans. He identified tenants and the spaces they leased. John Kelly, at Kirtland's suggestion and in his presence, wrote the names of additional tenants in the appropriate spaces on the leasing plans. (A170)

Each of the representations regarding the amount of space leased at the Mall was false. In August 1972, when the advertising brochure stated more than 50% of the Mall was leased, only 15% of the space was leased. (PX 7 at E53) In November 1972, when that representation was repeated, only 31.9% of the Mall was leased. (PX 7 at E55) On December 4, 1972, when Kirtland said about 90% of the Mall was leased, only about 32% was in fact leased. (PX 7 at E55)

The leasing plans were probably the most fraudulent documents of all. They showed over 60% of the space leased to identified tenants when the Mall was only about 32% leased. Many supposed tenants never rented space. On the second floor alone, printed on the leasing plans, were the names of the following ten stores which never leased space at the Mall:

Store No.	Name
231	Burt Lancaster Health Food
232	Universal Spa
234	Dannemann's Fabric
235A	Unisex Hair Stylist
250A	Kerns Piano
221	Montgomery Grant Camera
221A	Lady Madonna
219	Fashion Optical
226A	Bridal Traditions
235	Possibilities

(Compare, PX 7 at E53 with PX 20)

At the December 4 meeting, Kirtland also represented that defendants' estimate of real estate taxes was $1.25 per square foot per annum on a fully assessed Mall with the landlord to pay the first $.25. (A23, 171-72) With respect to common area charges, Kirtland represented that defendants' estimate was $.60 per square foot per annum. (A24, 171) John Kelly pressed Kirtland on the accuracy of these estimates. He told Kirtland that Magnaleasing had to provide these figures to a dealer to whom Magnaleasing was going to sublease the store. (A23, 167) Kirtland said the estimate of taxes could vary by as much as $.25 each way. (A171) Kirtland told John Kelly that these figures could be used by Magnaleasing in planning its operation at the Mall. (A24) To support the reliability of the estimates, Kirtland stressed Feist & Feist's long experience in real estate

and the management of shopping centers in the New York area. (A171)

Kirtland stated at the meeting that the defendants were seeking a base rent of $7.50 per square foot. Several days after the meeting, John Kelly informed Kirtland that Magnaleasing could not afford $7.50 together with estimated common area charges of $.60 per square foot and real estate taxes of $1.25 per square foot. (A173-174, JS ¶82 at E20) In January 1973, after further discussions, Kirtland wrote Kelly stating that he was authorized to offer a base rent of $6.50 per square foot. (PX 23 at E239) This proved agreeable to Magnaleasing which entered into its lease in April, 1973.

The representation regarding common area charges was inserted in the lease, which reads:

> For purposes of the period from the Commencement Date [August 9, 1973] to the date Landlord furnishes the first statement to Tenant [April 15, 1974], Landlord's estimate of Tenant's Proportionate Share of Common Area Charges shall be 60¢ per annum per square foot of Floor Space in the Demised Premises. (PX 15 at E126-127) [bracketed words added]

The representation regarding real estate taxes was not in the lease, but the lease did provide that before the Mall opened an estimate would be provided. (PX 15 at E119) John Kelly testified: "I fully expected that the estimate would be as related by Mr. Kirtland." (A178)

The representations that Feist & Feist estimated common area charges at $.60 per square foot per annum and real estate taxes at $1.25 per square foot per annum were false representations at the time they were made. In December 1972, Feist & Feist had in fact estimated common area charges at $2.27 per

square foot (A94) and had estimated real estate taxes for a partially assessed Mall at $2.34 per square foot. (PX 11 at E75)

Defendants' Knowledge of the Falsity of The Representations and Intent to Deceive.

The knowledge of Feist & Feist, Irving Feist, and John Feist was the knowledge of defendants. Irving and John Feist were the president and vice president respectively of defendant corporations and Feist & Feist. Defendants Blackfriars and Tottenham had no records regarding the Mall. All information relating to the development, construction, leasing and operation of the Mall was prepared by Feist & Feist. (A76, JS ¶¶68, 69 at E17) Financial information was prepared by Messrs. Faughnan and Fraher. (A156, 98)

Defendants knew that the representations regarding the rate and percentage of occupancy were palpably false. Since as early as August 1972, John Feist, who was in charge of the Mall's leasing program, met with Feist & Feist's leasing committee approximately every three weeks to discuss progress in leasing the Mall. (A50) Leasing reports, showing the percentage of space leased, such as plaintiff's exhibit 6, were prepared after each meeting under the direction of John Feist. (A52, PX 6 at E52) Feist & Feist and John Feist, in particular, had in their possession after each such meeting information as to what space actually was leased. (A52) Defendants' leasing records reveal that the percentage of leased spaced at the Mall did not reach the 50% level until the end of April 1973, long after August 1972, when Feist & Feist told Magnaleasing it had reached 50%, as the following list shows:

July 30, 1972	10%
August 31, 1972	15%
September 30, 1972	18%
October 31, 1972	25%
November 30, 1972	31%
December 31, 1972	34%
January 30, 1973	45%
March 30, 1973	48%
April 30, 1973	50%

(PX 7 at E53-56)

Defendants' intent to deceive Magnaleasing regarding the rate and level of leasing at the Mall is established by uncontroverted facts. In July 1972, only 10% of the Mall was leased and the opening was scheduled for spring 1973. (PX 2 at E46) To create the impression of a successful Mall defendants published the August advertising circular stating that more than 50% of the Mall was leased. This representation was reiterated in the November 1972 circular. It was buttressed by the leasing plans, showing more than 60% of the Mall leased in December, and containing numerous names of non-existent tenants.

George Kirtland contributed to the impression of a Mall rapidly being leased when he told Dale Kelly in December 1972 that the Mall was about 90% leased. The reason for these misrepresentations aptly stated by the financial staff of Feist & Feist, which in commenting on the condition of the Mall, said: " The obvious problem was lack of tenants." (PX 13 at E78)

The knowledge of falsity and intent to deceive with respect to the two estimates is just as clear. In August 1972, Mr. Faughnan, Feist & Feist's controller, sent a memorandum to John and Irving Feist saying:

> ...I think we should also ask ourselves whether it is economically feasible for our

tenants to carry such high costs. (PX 9 at E62).

The costs to which he referred were those contained in his accompanying financial analysis which showed real estate taxes estimated at $2.15 per square foot of which the landlord was to pay $.25 and common area costs estimated at over $1.50 per square foot. (PX 9 at E63-66, A82, 85) Mr. Faughnan testified that he discussed these estimates with John Feist. (A161)

Two weeks later, Mr. Faughnan provided Irving and John Feist with a nine page detailed financial report showing the income, which Feist & Feist estimated it would receive from the tenants for common area charges, to be over $2.20 per square foot. Real estate tax charges were estimated at $1.90 per square foot excluding the $.25 which the landlord was to pay. (A162) Mr. Faughnan testified that he discussed these estimates with John Feist. (A162)

John Feist testified that between January 1972 and August 1973 he instructed his sales personnel to represent to prospective tenants that defendants' estimate of real estate taxes was $1.25 per square foot per annum and its estimate of common area charges was $.60 per square foot per annum. (A73, 74) John Feist also said he knew prospective tenants would rely on these estimates. (A73, 74) These were not defendants' true estimates.

From August 1972 through April 1973, defendants' financial records were being updated continuously. For example, on October 16, 1972, Mr. Fraher, the construction chief, sent to Irving and John Feist a financial report which estimated

income from tenants of over $2.00 for real estate tax charges and over $2.00 per square foot for common area charges. (A94, 96, PX 10 at E68) Financial information was continuously being provided to John Feist (A162) and he fully understood the purport of it.

On December 15, 1972, John Feist in a confidential memorandum to Irving Feist said:

> Ed Fraher told me the other day that he figures the tenants' share of the taxes at Staten Island Mall for the opening year to be $2.34 per square foot (PX 11 at E75)

In this same memo John Feist confided:

> ...If we're going to have taxes like this (in addition to the common area and everything else), we're certainly going to have problems with our tenants. (PX 11 at E75)

This concern was not communicated to the tenants. (A101) Indeed, John Feist never altered his instructions to his sales people to provide estimates of common area charges at $.60 per square foot and real estate taxes at $1.00 per square foot. (A73, 74, 101)

In January of 1973, Feist & Feist prepared yet another estimate of income and expenses which confirmed the high common area and tax charges. This financial statement estimated tax rent income from tenants for the opening year at the Mall at $2.42 per square foot based only on a partial assessment and $4.55 for the second tax year based on a full assessment. Common area charges were estimated at $2.26 per square foot. (PX 14 at E83-92)

John Feist testified that he did not believe the Feist

& Feist estimates prepared by its financial and construction chiefs. With respect to common area charges he claimed that his own estimate of $.60 was more in accord with his experience, but pointed to nothing in his experience as a basis for that conclusion. With respect to real estate taxes, he stated that he based his estimate of real estate taxes at the Mall on the taxes of a nearby Korvettes shopping center. (A101) Yet, John Feist admitted that he had "no idea about tax assessment" and that he had people to make such estimates. (A105) Furthermore, the facts showed that Korvettes shopping center was not a two story enclosed mall like the Staten Island Mall (A103) and was not subject to a straight comparison with the Mall. The Korvettes center completely developed was assessed at 6.9 million dollars. (A152) Feist & Feist and Ely-Cruikshanks Co., Inc., an outside consultant, as early as August 1972, appraised the value of the Mall at 30 million dollars with an estimated assessment of 19 million dollars. (PX 18 at E220)

Magnaleasing's Reliance on Material Facts.

The Mall was in its final stages of completion when Magnaleasing negotiated and executed its lease. Magnaleasing could not know which spaces had been leased at the Mall and did not have the information to independently determine the common area and real estate tax charges. Only Feist & Feist had all of the information regarding the common area costs to be incurred at the Mall, including the actual costs of contracts into which it had entered. (A124) The information required to prepare a real estate tax estimate for the Mall was the cost of the land, the cost of developing the land, and the cost of

constructing the Mall. Only Feist & Feist had this information. (A134, 135)

Defendants conceded that the level of occupancy is an important consideration for a tenant entering into a lease. (JS ¶100 at E23) Dale Kelly testified that the percentage of occupancy was an important factor in deciding whether to lease space at the Mall (A31, 32), and that, if he had known that the percentage of occupancy was less than 50%, he would not have recommended entering into the lease. (A32, 33)

John Feist admitted that common area charges and real estate taxes are important considerations for a tenant entering into a lease. (JS ¶100 at E23) He also said that he knew prospective tenants would rely on the estimates provided by his sales people. (A74) The importance of these items to Magnaleasing was evident from the negotiations. John Kelly told Kirtland that Magnaleasing could not afford to rent space at $7.50 per square foot for base rent in addition to $1.00 for tax rent and $.60 for common area charges, for a total amount of $9.10. (JS ¶82 at E20, PX 5 at E50) The parties agreed to a base rent of $6.50 per square foot with estimated costs of $1.60 for a total rent of $8.10. Magnaleasing relied on these figures and would not have entered this lease if it had been told the true estimates of over $2.00 for common area charges and over $4.00 for taxes for a total rent of over $12.50.

Facts Relating to Defendants' Affirmative Defense of Laches and Waiver

As soon as Magnaleasing learned of the actual common area and real estate tax charges, it complained to Feist & Feist, but the full extent of the misrepresentations were not known to

Magnaleasing until 1975, after this action was commenced. This was because Feist & Feist continued to conceal the actual charges by billing the tenants on the basis of false estimates and many months later billing them retroactively for the difference between the estimated and actual charges.

The lease provided that at the beginning of each lease year, the landlord would provide the tenant with an estimate of the tenant's share of common area charges and real estate taxes and bill the tenant monthly on the basis of this estimate. (Lease §4.5A, PX 15 at E119, §5.3B, PX 15 at E125) At the conclusion of the lease year, the landlord would compute the actual charges and backbill the tenant for the difference between the estimated and the actual charges. (Id.) The lease year was from February 1 to January 31, except for the opening year, which was August 9, 1972 to January 31, 1973. (Compare, Lease §4.4, PX 15 at 118 with JS ¶44 at E11)

Feist & Feist handled the billing of real estate taxes in the following manner. In August 1973, Magnaleasing received a bill estimating its taxes at $2.45 per square foot for the tax year July 1, 1973 to June 30, 1974. (A188) In April 1974, Magnaleasing received a bill estimating its taxes at $2.64 per square foot for the tax year July 1, 1974 to June 30, 1975. (A189) Feist & Feist knew that this estimate was completely false, because the Mall was fully assessed on January 25, 1974.* Feist & Feist knew that Magnaleasing's taxes were going to be over $5.00 a square foot. It did not disclose this fact. Rather

*N.Y. City Charter, Ch. 58 §1507.

it waited until 1975, and then backbilled Magnaleasing at the rate of $5.80 per square foot per annum for the entire past year. (A189)

Common area charges were handled in the same way. Magnaleasing was billed for common area charges at $.60 per square foot from August 9, 1973 to April 1974. In April 1974, Magnaleasing was backbilled at the rate of $2.58 per square foot, but only for the period commencing February 1, 1974. (A253) It was not until December 1974, that Feist & Feist backbilled Magnaleasing $2.58 for common area charges for the initial period of the lease, August 9, 1973 through January 31, 1974. (A254)

Magnaleasing protested promptly each time it learned of the difference between what was represented and what was actually charged for taxes and common area charges. In August 1973, John Kelly, on receipt of the tax bill, wrote to Mr. Faughnan of Feist & Feist, protesting that taxes were not as represented by George Kirtland. (PX 24 at E245) In April of 1974, John Kelly wrote to John Feist protesting the misrepresentations regarding occupancy, real estate taxes and common area charges. (A184 PX 26 at E248-251) At that time Mr. Kelly did not know the true real estate taxes or that Feist & Feist was going to backbill common area charges for the initial lease period. A meeting between Magnaleasing and Feist & Feist was held on May 16, 1974 to resolve differences. (A247) Further correspondence and communication regarding the problems occurred in May and June 1974. (JS ¶95, 98, 99 at E22, 23) During the summer of 1974, Magnaleasing's tenant and other ten-

ants at the Mall retained an attorney to represent them in negotiations with the landlord. (PX 27 at E254) These negotiations continued for several months until they failed.

In August 1974, Magnaleasing stopped paying additional rent charges that exceeded the estimates given to them. (A188) In the fall of 1974, defendants commenced a summary proceeding against Magnaleasing for failure to pay additional charges. On December 19, 1974, Magnaleasing brought this action.

Facts Relating to Damage Reference

The court's decision referring the matter to Magistrate Martin Jacobs as Special Master was filed on July 6, 1976. Defendants prepared the judgment which directed the reference. Their judgment which was entered on consent says:

> ORDERED, ADJUDGED AND DECREED that this action be and the same hereby is referred to Magistrate Martin D. Jacobs, as Special Master, to take an accounting and to hear, compute, determine and report as to the amount of damages due to plaintiff.... (A51a)

On July 14, 1976, the parties had their first prehearing conference on the damage issue before Magistrate Jacobs. Defendants made no objection to the reference, but instead requested substantial additional discovery, which request was granted over Magnaleasing's objection. (Affid. of Bannett ¶17, at A126a)

On July 29 and August 23, 1976, the parties took part in additional prehearing conferences before Magistrate Jacobs. On neither occasion did defendants object to the reference. Instead, defendants continued their insistance on additional discovery. (Affid. of Bannett ¶¶18, 19, 21 at A126a, 127a) It was not until the damage hearing held on August 31, 1976,

after defendants had received discovery, that defendants objected to the reference. Magistrate Jacobs responded that their objection was untimely:

> I would also like to say before concluding the matter that I had a pre-trial conference in this matter after the judge's memorandum order, that conference having been held on July 14, 1976, attended by counsel for both the plaintiff and the defendant, and there was no suggestion at that time before me that there was any objection to my going forward as Special Master to determine and report as to damages. (D12, 13).

He also stated that it was not his function to rule on defendants' objection to the reference. (D10) Despite Magistrate Jacob's admonitions, defendants failed to bring their objections to the court until February 28, 1977, after Magistrate Jacobs had rendered his determination adverse to defendants and Magnaleasing had moved to confirm that determination.

Credibility

George Kirtland, who was an employee of Feist & Feist at the time of the trial (JS ¶26 at E5), did not testify as a witness. Irving Feist, the president of Feist & Feist, Blackfriars and Tottenham, did not testify.

As the court noted during the course of the trial, John Feist's testimony was evasive. (A115) John Feist, who was primarily responsible for the operation and maintenance of the Mall, testified that he was sent all financial information regarding the Mall (A78), but he did not remember receiving most of the financial reports prepared by Feist & Feist, including those that bore his own handwriting. (A77, 78, 91, 111, 114) He testified that he would not have read the cash flow statement

if he had received it. (A112) John Feist denied discussing financial information with his controller, Mr. Faughnan. (A116) By contrast, Mr. Faughnan testified that he continuously informed John Feist of the financial affairs of the Mall. (A162) John Feist initially denied having any discussion relating to financial matters, then recanted. (Compare, A115 with A117)

John Feist told his salespersons that his estimate of common area charges was $.60 per square foot, but admitted that his estimate of common area charges was over $2.00 per square foot. (A133)

John Feist, who was in charge of the leasing program at the Mall, denied knowing how much space was leased at the Mall in August and November 1972 or in August 1973 when the Mall opened. (A61, 62, 67-68) He even denied remembering that prior to April 1973 Feist & Feist had trouble leasing the Mall. The following is an illustration of John Feist's evasive testimony upon which Judge MacMahon commented:

> Q That document, in the first few paragraphs refers to--if we may go back--"It is assumed that the mall will open some time in April."
>
> Was that memo prepared some time prior to April of 1973?
>
> A. [John Feist] I don't know.
>
> Q. Was it prepared before the mall was opened?
>
> A. I do not know when it was prepared.
>
> Q. I am just asking you, was it prepared prior to April 1973?
>
> A. There is no date on it.

MR. BERGEN [counsel for defendants]: Your Honor, we will stipulate that it was prepared some time before April of 1973. It seems to refer to April of 1973.

THE COURT: Obviously it does.

Q. Do you recall reviewing the cash flow statement?

A. No, I do not.

Q. But do you recall receiving it?

A. No, I do not.

Q. But you did receive it.

A. I don't remember.

Q. Well your initials--your name is on here--not your name--your handwriting.

A. That is correct.

Q. Does that refresh your recollection that you did receive it?

A. No, it does not.

Q. If you had a cash flow statement would you have reviewed it?

A. No, I would not. (A111, 112)

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ERR IN FAILING TO ARTICULATE AND APPLY A HIGHER BURDEN OF PROOF TO SUSTAIN A FINDING OF FRAUD

Defendants, relying on two decisions of this Court, argue in Point I of their brief, that Judge MacMahon's decision must be reversed, because the opinion does not state the standard of proof utilized in finding fraud. Defendants argue that it must be presumed that the court impermissibly used the "pre-

ponderence of the evidence" test rather than the "clear and convincing evidence" test. The trial record shows that Judge MacMahon articulated and applied the correct burden of proof. During closing argument Judge MacMahon specifically warned counsel for plaintiff that "[t]he burden is on you to show me by clear and convincing evidence" the proof of your case. (A312)

Futhermore, the language used throughout Judge MacMahon's opinion articulated his application of the clear and convincing standard of proof. He stated that there was "no doubt that the representations regarding occupancy levels were representations of material facts." (A37a) He stated that it was "clear" that Feist & Feist knew that the rate of leasing was an important factor and that they had made the representations hoping that Magnavox would rely on them. (A38a) He stated that defendants' explanation for the occupancy representations was "totally without merit". (A40a) He stated that real estate taxes and common area charges were "clearly" material facts. (A44a) He stated that Feist's explanation for the tax and common area charge representations was "totally incredible". (A44a)

Finally, the evidence as discussed more fully in other portions of this brief, clearly and convincingly demonstrates defendants' fraud. Hence, even if Judge MacMahon had failed to indicate that he was requiring the plaintiff to prove its case clearly and convincingly, any such error would have been harmless and not reversible. 28 U.S.C. § 2111 (1949)

POINT II

THE DISTRICT COURT'S DECISION NOT TO DISMISS THIS ACTION AS A MATTER OF LAW WAS NOT CLEARLY WRONG

Misrepresentations as to Common Area and Tax Charges

In reviewing whether Judge MacMahon's determinations of law are in accord with the law of New York, this Court may not substitute its judgment for that of Judge MacMahon and may reverse only if he was clearly wrong. Lomatira v. American Automobile Insurance Co., 371 F.2d 550, 554 (2d Cir. 1967).

Defendants contend, in Point II of their brief, that the district court erred in failing to dismiss the amended complaint as a matter of law because defendants' estimates of common area charges and taxes, even if deliberate misrepresentations, were non-actionable statements of opinion as to what may happen in the future. Judge MacMahon rejected this contention saying:

> It has long been the law of New York that an expression of opinion may constitute actionable fraud...
>
> ...[T]he expression of an opinion or prediction which the declarant does not himself believe is a false statement of fact. (A41a, A42a)

Defendants' counsel conceded at trial that Judge MacMahon's view of the law is an accurate one:

> THE COURT: Well, suppose Mr. Feist had in his possession from an expert in the field that the common-area charges, the best we can determine them, are going to be $2 and that every day he tells the prospective lessee that they are going to be 60 cents. Wouldn't that be a false representation?
>
> MR. BERGEN: I don't think anybody was told that they were going to be 60 cents, they are going to be billed at 60 cents.

THE COURT: I am talking about under the law, wouldn't that be a false representation?

MR. BERGEN: I think if there was reliance on it and if it was a material issue--

THE COURT: We will come to the reliance later. Wouldn't it be a false representation?

MR. BERGEN: Yes.

. . .

THE COURT: Doesn't it come down to whether Feist himself believed at the time he made it that it was 60 cents and not 2.40? Doesn't it come down to that.

If he dishonestly estimated it at 60 cents when all the information in his possession showed that he was wrong, that it was going to be 2 or 2.50, isn't that the question?

MR. BERGEN: Well, if he dishonestly represented it, but I don't think that there is any evidence to indicate that Mr. Feist dishonestly held to this 60-cent figure. (A295, 298)

Judge MacMahon's determination is in accord with New York Law. Taylor v. Burr Printing Co., 26 F.2d 331, 334 (2d Cir. 1928); Gray v. Richmond Bicycle Co., 167 N.Y. 348, 60 N.E. 663 (1901); Hickey v. Morrell, 102 N.Y. 454, 7 N.E. 321 (1886); W. PROSSER, LAW OF TORTS § 109 (3d ed. 1964); 12 S. WILLISTON, CONTRACTS § 1494 (3d ed. 1970); 24 N.Y. JUR. Fraud & Deceit. §§ 35-39. A statement of opinion as to what may happen in the future may constitute actionable fraud, where there is a present intent to deceive and where the facts show that plaintiff is entitled to rely on the opinion. Channel Master Corp. v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403, 176 N.Y.S.2d 259 (1958);

Lanzi v. Brooks, 54 A.D.2d 1057, 388 N.Y.S.2d, 946, 948 (3rd Dept. 1976); Scaroon Manor Operating Corp. v. W.P. & L. Realty Corp., 136 Misc. 910, 241 N.Y.S. 229 (Sup. Ct. N.Y. Co. 1930); Erchorn v. Serles & Co., Inc., 118 Misc. 256, 192 N.Y.S. 797 (1st Dept. 1922). As stated in New York Jurisprudence:

> ...[W]here a person making a statement as to a future event is guilty of an actual fraudulent intent, and makes the misrepresentation with the intention of deceiving and defrauding the other party, and accomplishes this result to the latter's injury, fraud may be predicated thereon, notwithstanding the future nature of the representation. This result is reached on the theory that a person's intention or belief is a matter of fact and that therefore if a misrepresentation is made with regard to it, the misrepresentation is one of fact. 24 N.Y. JUR. Fraud & Deceit §44 (1962). Accord, W. PROSSER, LAW OF TORTS §109 (14th ed. 1971); S. WILLISTON CONTRACTS, §1494 (3rd ed. 1970).

Feist & Feist was asked for its estimates of common area charges and real estate taxes. The existence and amounts of those estimates were facts. Feist & Feist at the December 4, 1972 meeting said its estimate of common area charges was $.60 per square foot per annum. This estimate was restated in the lease which provides, that, for the initial period of operation, which was from August 9, 1973 to January 31, 1974, landlord's estimate of tenant's proportionate share of common area charges shall be $.60 per square foot per annum of floor space in the demised premises. (PX 15 at E 126-127) This representation was a false statement of a presently existing fact as to what was defendants' true estimate of common area charges. Defendants' true estimate of such charges was over $2.00 per square foot. Similarly with respect to the real estate tax estimate, the estimate provided to Magnaleasing was not defen-

dants' true estimate. The misrepresentation of defendants' real estate tax estimate was a misstatement of a presently existing fact.

Defendants next argue, in Point II B 1 of their brief, that Magnaleasing could not justifiably have relied on defendants' estimates of common area and real estate tax charges, because the actual future cost of operating the Mall and its assessment were unknowable, and because Magnaleasing showed sophistication in negotiating its lease. Judge MacMahon held that under the circumstances of this case, it was reasonable for Magnaleasing to rely on defendants' estimates. Judge MacMahon stated:

> Only defendants were in a position to know the estimated costs of the completed Mall, the information necessary to form an opinion regarding the taxes and common area charges. Since the Mall was not completed at the time of the negotiations, Magnaleasing had to rely on what it was told by the developers of the shopping area. It was therefore reasonable for plaintiff to rely on defendants' representations, and if defendants gave plaintiff an estimate which defendants, in fact, did not entertain, in order to induce plaintiff to sign a lease, their estimates were fraudulent. (A42a)

Judge MacMahon's finding is in accord with New York cases holding reliance justifiable where the party making the representation has superior knowledge or holds himself out as having superior knowledge. Gray v. Richmond Bicyle Co., supra; Hickey v. Morrell, supra; Schumaker v. Mather, 133 N.Y. 590, 30 N.E. 755 (1892); Todd v. Pearl Woods, Inc. , 20 A.D.2d 911, 248 N.Y.S.2d 975, 977 (2d Dept. 1964), aff'd, 15 N.Y.2d 817, 257 N.Y.S.2d 937, 205 N.E.2d 861 (1965); Belkin v. Belkin, 40 Misc. 2d 984, 243 N.Y.S.2d 995 (Sup. Ct. Kings Co. 1963); 24

N.Y. JUR. Fraud & Deceit, §39 at 127 (1962).

The trial record contains substantial evidence supporting Judge MacMahon's finding that plaintiff was justified in relying upon the representations of Feist & Feist. All the information required to make an informed judgment on the amount of space leased and the anticipated common area charges and real estate tax charges was in the possession of Feist & Feist. It had over 70 years experience in real estate and emphasized this experience in dealing with Magnaleasing (A 69, 70, 171) John Feist knew that tenants would require estimates of expenses because the Mall was incomplete. He instructed his salesmen to give out estimates of common area and real estate tax charges and knew tenants would rely on them. (A 74) The testimony of defendants, experts in the real estate business, that estimates are provided and expected to be relied upon is a complete answer to defendants' contention that reliance on the estimates was unjustifiable.

The argument that reliance cannot be based on an estimate, because the actual amount is obviously unknowable, is specious. Estimates are a necessary concomitant of doing business. Millions of dollars are invested and loaned each day on the basis of estimates. A fraud claim cannot be predicated on an estimate because it proved to be wrong, but when the estimate is issued dishonestly with intent to deceive, the estimate is actionable. See, Gross v. State Cooperage Export Crating and Ship. Co., 232 A.D.2d 540, 299 N.Y.S.2d 773 (2d Dept. 1969).

Defendants' inference that their estimates are speculative is belied by the record. Feist & Feist's financial ex-

perts based their estimates on hard data, the cost of constructing the Mall and the cost of the actual maintenance contracts into which it had entered. (A 104, 105, 145, 146) These estimates were used by Feist & Feist in planning its operation and management of the Mall. They had no other estimates. (A97) Defendants' actual estimates included not only estimated costs but also estimated income from tenants which defendants expected to receive. These true estimates were remarkably accurate in projecting initial common area and real estate tax charges of over $2.00 per square foot.

When defendants provided estimates as experts, they impliedly represented that their factual data supported their estimates and when they misrepresented their estimates, they also misrepresented the underlying facts. These were representations of fact upon which reliance was justified even by a prospective lessee in an arms length transaction. Hickey v. Morrell, 102 N.Y. at 465, Prosser, supra, at 727. That Magnaleasing was represented by counsel experienced in commercial leasing who engaged in vigorous negotiation does not change the fact that it was entitled to rely upon defendants speaking the truth. Taylor v. Burr Printing Co., 26 F.2d at 334; National Conversion Corp. v. Cedar Building Corp., 23 N.Y.2d 621, 298 N.Y.S.2d 499, 246 N.E.2d 351 (1969).

Defendants rely on a substantial number of inapplicable New York cases. Two of the cases relied on by defendants restate the principle that a statement of opinion, prediction or future expectation may be actionable. Lanzi v. Brooks, supra; Channel Master Corporation v. Aluminum Limited Sales, Inc.,

supra. None of the cases cited by defendants are contrary to the position that a statement of opinion, prediction or future expectation may be actionable if made with a present intent to deceive. Defendants' cases involve completely speculative statements of opinion or the interpretation of contractual provisions. In none of the cases relied upon by defendants was there any showing as was made here of circumstances which would make reliance justifiable. In none of these cases is there an indication that the misrepresentations were made, as they were here, with knowledge that they would be relied upon. In Baily v. Diamond International Corporation, 47 A.D.2d 366, 367 N.Y.S.2d 107 (3d Dept. 1975), the misrepresentation was an opinion as to the outcome of future litigation, something totally speculative. In Davidowitz v. Dixie Associates, 76 Misc. 2d 554, 351 N.Y.S.2d 34, 39 (Sup. Ct. N.Y. Co. 1973), modified on other grounds, 44 A.D.2d 535, 353 N.Y.S. 2d 447 (1st Dept. 1974), the misrepresentation was a puffing statement that "the garage is an excellent business". In Irving Trust Company v. La Pilar Realty Inc. __ A.D.2d __, 391 N.Y.S.2d 131 (1st Dept. 1977), there was no showing that defendants' representations were other than speculation and there was no proof that any misrepresentation had been made. In Danzig & Danzig Associates v. Paolucci, N.Y.L.J., June 11, 1975, at 19 (Civil Court, Queens Co.), there was no showing that defendants' representations were other than speculation and there was no showing of an intent to deceive. One case relied on by defendants did not even involve an allegation of fraud. City of Hope, Inc. v. Fisk Building Associates, N.Y.L.J., March 1, 1976, at 10-11 (Sup. Ct. N.Y. Co.).

The remainder of defendants' cases hold, that in the circumstances of those cases, plaintiffs were not justified in relying upon defendant's representations because all the information on which the representations were based was equally available to both parties, in contrast to this case where only defendants had the information upon which they based their true estimates. Danaan Realty Corp. v. Harris, 5 N.Y.2d 317, 322, 184 N.Y.S.2d 599, 157 N.E. 2d 597 (1959); Sylvester v. Bernstein, 283 A.D. 333, 127 N.Y.S.2d 746 (1st Dept), aff'd, 307 N.Y. 778, 121 N.E.2d 616 (1954). In Irvlor Realty Corporation v. 62-114 Imlay Street Corp., 151 N.Y.S.2d 191 (Sup. Ct. Kings Co. 1956), aff'd, 7 A.D. 2d 645, 180 N.Y.S.2d 203 (2d Dept. 1958) the representation concerned a tax assessment that was a matter of public record and future tax rates which were speculative. Other cases cited by defendants involve allegations that defendants misrepresented their interpretation of contract provisions where all parties had an opportunity to read the contract provision and arrive at their own interpretation. Charid Properties, Inc. v. Berger, 37 A.D.2d 986, 327 N.Y.S.2d 821 (2nd Dept. 1971), aff'd, 32 N.Y.2d 667, 343 N.Y.S.2d 1320 (1973); Zuyder Zee Land Corporation v. Broadmain Bldg. Co., Inc., 86 N.Y.S.2d 827 (Sup. Ct. N.Y. Co.), aff'd, 276 App. Div. 751, 92 N.Y.S.2d 607 (1st Dept. 1949); Flam v. Campbell Bosworth Machinery Co., N.Y.L.J., October 12, 1973 at 17 (Civil Court, N.Y. Co.); Romance Bridals, Inc. v. 1385 Broadway Co., N.Y.L.J., January 27, 1976 at 6 (Sup. Ct. N.Y. Co.); Puro v. Zimmerman, N.Y.L.J. April 18, 1977 at 14 (Sup. Ct. N.Y. Co.).

Finally, defendants seek to bring this case within

the scope of the cases involving lease interpretation by alleging that Magnaleasing claims the $.60 and $1.25 representations are limitations on the amount of common area and real estate tax charges Magnaleasing would have to pay under its lease. Defendants argue that such limitations are inconsistent with the provisions of the lease. This argument hardly deserves comment. Nowhere in the entire record is there any statement that Magnaleasing only expected to pay $.60 and $1.25 and no more for common area and tax charges. John and Dale Kelly testified without equivocation that the representations were of estimates and were not limitations of future expenses. (A25, 190, 194, 229, 255, 256)

Defendants' Misrepresentations as to Occupancy

There is no dispute that defendants' representations that the Mall was more that 50% leased in August and more than 90% leased in December are actionable representations of fact. As one court recently held:

> The statements in this case made by defendant's agent as to the number of present tenants having signed leases with the apartment complex, prior to the execution of the lease, exemplify ideally an instance in which the statements are not intended or reasonably to be understood merely as an expression of an opinion. Said statements constituted a misrepresentation of a material fact peculiarly within the knowledge of the party making it. North Oaks Pharmacy, Inc. v. North Shore Towers Associates, N.Y.L.J., March 24, 1977 at p.11 (Sup. Ct. Queens Co.).

Defendants do not dispute that Magnaleasing justifiably relied on the representation that the Mall was 90% leased in December. They argue, however, in Point II B 2 of their Brief that Magnaleasing could not have relied justifiably on the re-

presentation that the Mall was 50% leased in August, because the leasing plans displayed to John and Dale Kelly on December 4 allegedly showed that the Mall was only 24% rented. Defendants raised this same issue to the trial court. Judge MacMahon rejected it stating:

> Defendants next argue that, even if some of the representations were false, plaintiff was not justified in relying on them because only 24.2% of the space on the floor plan of the shopping center is marked by black dots designating space already leased. The contention ignores the testimony of both Kellys that Kirtland told them that space fitted with the printed name of a merchant (but perhaps without a black dot) were also rented, and that in order to make the plan current John Kelly should write in the names of tenants who had signed since the plan was prepared. In light of this uncontradicted testimony defendants' claim is totally without merit. (A40a)

Judge MacMahon's findings are supported by the evidence. No aspect of defendants' appeal is more disingenuous than their reliance on the leasing plans which were displayed by George Kirtland to John and Dale Kelly at the December 4 meeting. These plans, as testified to by both Kellys, were an integral part of Kirtland's fraudulent presentation designed to convince the Kellys that the Mall was virtually all leased in December 1972. These plans were blatantly false documents. On the second floor alone, the names of ten stores were printed which never executed a lease. (supra at p. 7) George Kirtland used the leasing plans to support his uncontroverted representations to Dale Kelly that 90% of the Mall was leased and to John Kelly that the Mall was virtually all leased. Using the plans he indicated that there were very few stores available in the size or location Magnaleasing wanted and even had John

Kelly write in the names of tenants who supposedly had leased space since October 18, 1972, the date of the plans. (A30, 170)

The leasing plans had the names of tenants printed in store locations. (A30) In some spaces in which a name was printed there also appeared a black dot, which according to a legend on the plan means the space is leased. Defendants contend that, because of the legend, a printed name of a tenant in a store location without a black dot could not possibly indicate a leased store. This contention ignores the testimony of both Kellys. (A30, A249) It was the understanding of John and Dale Kelly based on Kirtland's presentation that stores which had leased space were designated on the plan either by black dots with printed names or by printed names without black dots. (A30, 249) Dale Kelly testified:

> Q. Did you know what the actual occupancy of the mall was at the time you were negotiating with them?
>
> A. Mr. Kirtland showed us a map of the center on which it was clearly marked on the black dots showing where leases had been signed--
>
> MR. BERGEN: I don't think the witness is responding to the question, your Honor.
>
> THE COURT: I think it is responsive. Go on.
>
> A. He presented this chart showing black dots on it for which leases had been signed, and on the same chart he had names of various stores that had signed other leases since that time.
>
> THE COURT: You mean that weren't black dots?
>
> THE WITNESS: That weren't in black dots, no. (A30)

Defendants' counsel agreed that printed names signified leased stores even where there were no black dots. He stated:

> ...These things were constantly changing. So sometimes they would have a leasing plan that would have names in it and just black dots, and the next leasing plan that came out they would eliminate I assume some of the black dots and put in a name for the store.
>
> So we had three things on the leasing plans: the ones where there were names already written in, the large black dots indicating that there were leases signed and the small black dots indicating that leases were out. (A417)

George Kirtland, defendants' employee, was not called to testify. It should be inferred that his testimony would have supported Magnaleasing's position. Masterson v. Solomon, 191 Misc. 634, 80 N.Y.S.2d 866 (Sup.Ct. Kings Co. 1948), aff'd, 275 App. Div. 861, 89 N.Y.S.2d 261 (2d Dept. 1949), aff'd, 300 N.Y. 545 (1949).

POINT III

THE DISTRICT COURT'S FINDING OF FRAUD IS NOT CLEARLY ERRONEOUS

Defendants in Point III of their brief claim that Judge MacMahon's finding that defendants' misrepresentions of common area charges and real estate taxes were intentional is clearly erroneous. Defendants do not contend that Judge MacMahon erred in finding that defendants misrepresented leasing at the Mall was intentional. In reviewing whether fraud has been proven, the appellate court must not substitute its inferences for those drawn by the trial court and should defer to the determinations of credibility made by the judge who had the opportunity to

personally assess the credibility of the witnesses. AllState Ins. Co. v. Aetna Casualty & Surety Co. 326 F.2d 871, 874 (2nd Cir. 1964).

The facts set forth above establish overwhelmingly that the misrepresentations were made knowingly and with fraudulent intent. Short of a confession by John Feist, the evidence of fraud could not have been stronger. The undisputed documentary evidence shows that the Mall was in trouble because of lack of tenants. Defendants knew if prospective tenants realized the true level of occupancy and the true estimates for tax rent and common area charges they would not lease space. (PX 9 at E62, PX 11 at E75)

The starting point for any consideration of intent is the August 2, 1972 memorandum of Mr. Faughnan, the Feist & Feist controller, to Irving and John Feist. Mr. Faughnan had projected costs of $5.33 per square foot over minimum rents. He pointed out that these were higher than the norm and then cautioned: "I think we should also ask ourselves whether it is economically feasible for our tenants to carry such high costs." (PX 9 at E62) The memorandum was accompanied by a four page financial analysis. Common area charges, which were listed in detail, were estimated at over $1.50 per square foot and taxes at $2.15 per square foot. (A82, 85, PX 9 at E63). At this time only 10.7% of the Mall was leased. (PX 7 at E53) Within two weeks Feist & Feist received a seven page detailed financial analysis from Mr. Faughnan. This one compared Feist & Feist's appraisal of the Mall with that of Ely-Cruikshank Co., Inc. (A162, PX 18 at E220) The common area and real estate

tax charges which were contained in the August 2 financial analysis were confirmed in this report. The financial department continued to provide such detailed information right up to the opening of the Mall. Mr. Faughnan kept Feist & Feist, as well as John Feist, continuously informed of these estimates. (A162) John Feist admitted his estimate was over $2.00 per square foot. (A133, A162)

With all of this financial information it is incredible to believe that John Feist had a basis for his $.60 estimate of common area charges and $1.00 for real estate taxes. Certainly, these were not the estimates of Feist & Feist or its expert financial department.

John Feist's fraudulent intent is demonstrated by his confidential memorandum dated December 15, 1972. The secretiveness of the communication belies any claim of honest adherence to personal estimates. John Feist knew at that time that "we're certainly going to have problems with our tenants" when they discovered the true facts. (PX 11 at E75)

At the same time Feist & Feist was providing false estimates to its sales people, it was publishing false reports as to the level of occupancy and printing false and misleading leasing plans.

Defendants' contend that there was no evidence to show that John Feist did not honestly adhere to his estimate of $1.00 for taxes based on the tax at Korvettes. As a real estate expert he could not possibly have made a comparison between Korvettes and the Mall. His tax estimate based on Korvettes has no support in the record. Plaintiff showed at trial

that the assessed value of Korvettes shopping center was $6,916,500 for 1972 (A152) It also showed that in 1972 Feist & Feist's estimated tax assessment for the Mall and Convenience Center was $19,000,000. (PX 18 at E218-226) If defendants use of the Korvettes tax rent was to have any meaning at all, based on the different assessments, the figure should have been tripled.

Finally, John Feist said at the trial that "I have no idea about tax assessments". He also said that he had people to make estimates of tax assessments. (A105) Yet John Feist claims he ignored these people and relied on his own estimate of taxes about which he admittedly knew nothing. The court, as it was justified in doing, simply did not believe John Feist.

The credibility of John Feist is an important factor in determining whether he honestly adhered to his estimates. He was neither candid nor believable. John Feist testified at first that he never discussed financial matters. He insisted that he never discussed financials with his controller, Mr. Faughnan. This is directly contradicted by the testimony of Mr. Faughnan. Feist testified that he would not even have read a cash flow statement if he had received one. Judge MacMahon rightly found Feist's explanations incredible. In doing so he emphasized his own personal assessment of Feist as a witness.

> ...Moreover, John Feist was evasive and unresponsive on the witness stand. He denied any memory of receiving memoranda addressed to him, even those bearing his own notations. (A44a)

A defendant must be presumed to have intended the necessary consequences of his own voluntary acts. 24 N.Y. JUR.,

Fraud & Deceit, § 287 at 377. Fraudulent intent can be inferred from the fact that the representations were made, that they were false to defendants' knowledge, and that plaintiff relied on the representations. Taub v. Sylvan Farms, Inc. 269 App. Div. 860, 55 N.Y.S.2d 898 (2d Dept. 1945).

Fraudulent intent can also be inferred where a party issues a false representation with fraudulent recklessness knowing it will be relied upon. Eastern Capital Corp. v. Freeman, 10 Misc.2d 412, 168 N.Y.S.2d 834, 840 (Sup. Ct. N.Y.Co. 1957), aff'd, 8 A.D.2d 782, 187 N.Y.S.2d 978 (1st Dept. 1959). A statement is issued with fraudulent recklessness where it is based on grounds so flimsy as to lead to a conclusion that there was no genuine belief in its truth, or where there has been a patent refusal to see the obvious. State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 417 (1938); Goodman v. Title Guarantee & Trust Co., 11 A.D.2d 1003, 206 N.Y.S.2d 32 (1st Dept. 1960) Abel v. Paterno, 245 App. Div. 285, 281 N.Y.S. 58 (1st Dept. 1935). Defendants' representations were fraudulent under either standard.

Defendants contend, in Point III 2 of their brief, that Magnaleasing has failed to prove that the representations relating to taxes and common area charges are material. This contention is frivolous. It is stipulated that "John Feist believed that Tax Rent, Common Area Charges and occupancy levels were important considerations for a tenant entering into a lease." (JS ¶100 at E23) Moreover, a party making a deliberate misrepresentation to induce action is estopped from denying the materiality of the representation when the misrepresentation

has induced the desired action. Robitzek v. Reliance Intercontinental Corp., 7 A.D.2d 407, 183 N.Y.S.2d 870, aff'd, 7 N.Y.2d 1041, 200 N.Y.S.2d 424, 167 N.E. 74 (1960); 24 N.Y. JUR. Fraud and Deceit § 129 (1962).

Furthermore, if plaintiff was required to prove materiality, in view of this rule and John Feist's admission, it did so. Moreover, the testimony of plaintiff's witnesses established the materiality of the representations. (supra at pp. 13-14) Dale Kelly testified that he would not have recommended the lease if he had known the Mall was less than 50% leased on December 4, 1972. Both Kellys testified that Magnaleasing rejected the initial offer of Feist & Feist, because the combination of rent and common area and real estate tax charges was too high. Moreover John Kelly told Kirtland the estimates for common area and real estate taxes were important to Magnaleasing, because it had to use those figures in obtaining a subtenant.

A misrepresentation is material where the subject of the misrepresentation is sufficiently important and substantial to form the basis for a decision, in this case the decision to enter into a lease. The question of materiality is generally for the trier of fact. Robitzek v. Reliance Intercontinental Corp., supra. Judge MacMahon found that the representation material and his finding is fully supported by the record.

Defendants next contend in Point III 2a that plaintiff did not prove that defendants misrepresented their estimate of real estate taxes. John Kelly admitted that Kirtland did not use the precise words in the amended complaint, but his uncontroverted testimony fully supports the misrepresentation

allegation. John Kelly testified:

> He [Kirtland] then said real estate taxes-he estimated real estate taxes at $1.25 per square foot, again on a pro rata basis, and then I asked him again "Well, what did you base that on?"
>
> And he said, "Well, again it is based on our experience in the area."
>
> I said, "Well, can that estimate vary?"
>
> He says, "It could vary by as much as 25 cents one way or the other."
>
> I says, "Is that based on the mall as completed, fully assessed as completed?"
>
> And he says, "Yes, it is." (A171)

Defendants, in their Point III 2 b, engage in a semantic discussion between the words used during the trial and the precise wording of the complaint regarding common area charges. For example defendants say plaintiff did not prove that Kirtland said the $.60 estimate was "for the initial year of operations." John Kelly admitted Kirtland did not use this precise wording (A241, 242), but that is the clear intent of the lease provision. The lease states that the landlord's $.60 estimate of common area charges is for the period of the commencement date, which is the opening date of the Mall, August 9, 1973, until the landlord furnishes the statement to the tenant, which was to be sometime after January 30, 1974, the close of the lease year. Whether you define this period as the "initial year", or use the exact terminology of the lease, the meaning is the same. The contention that plaintiff did not prove that Kirtland used the phrases "and thereafter subject to normal increases" is equally disingenuous. This phrase characterized Magnaleasing's

clear understanding of Kirtland's statements that he was providing estimates, not fixed figures or limitations on common area and real estate tax charges. (A25, 190, 194, 229, 255, 256)

The final observation in defendants' Point III 2 b that Magnaleasing paid common area charges in accordance with the $.60 estimate is ludicrous. The uncontroverted testimony is that Magnaleasing paid $2.58 per square foot and not $.60 (A253, 254)

Defendants, in Point III 3 of their brief, contend that Judge MacMahon's finding, that their representations as to leasing were false, is clearly erroneous. Judge MacMahon found that defendants represented that the Mall was 90% leased in December. There is no dispute that this statement was false, but defendants argue that there is no evidence to support this representation as having been made. Defendants contention is totally without merit. Dale Kelly's testimony on this point is clear and unequivical. He testified:

> Q At that meeting would you be kind enough to tell me what Mr. Kirtland said to you and what you all said to Mr. Kirtland?
>
> A ...Then we went on to talk about the space and what it represented. He said that we were very fortunate, that the mall was about 90% completed -- leased, rather --
>
> THE COURT: What did he say, completed or leased?
>
> THE WITNESS: He said leased. I am sorry.
>
> A It was about 90% leased... (A19)

John Kelly's testimony is also clear that Kirtland said the Mall was practically all leased. (A167)

Defendant's contention that the representations re-

garding occupancy in the brochures were not false, because unsigned leases also had to be counted, is specious. The August brochure stated that the Mall was over 50% leased. There is no evidence of how many leases, if any, were out for signature in August. There is no evidence that, in August, Feist & Feist anticipated that any leases which were out for signature, assuming there were some, would be signed. The document relied on by defendants is a September 14 document. There is no evidence in the record that in September 1972 defendant expected that any of the "leases out" eventually would be signed.

Defendants' contrived argument is not supported by the record. If 95% of "leases out" as of September 14, 1972 eventually were signed, the total leased space at the Mall would be about 61%. The Mall did not reach the 61% level until after September 1973. (PX 7 at E53) If John Feist's statement was true, i.e., that 95% of the leases out for signature in September 1972 eventually were signed, that would mean no new leases were signed between August 22, 1972 and September 23, 1973. This is just not credible. Judge MacMahon rejected defendants' contention stating:

> Defendants assert that their figures were accurate because they included leases which had been agreed upon but had not yet been signed. The September 1972 leasing report indicated that an additional 44.68% of the available space in the Mall was thus "tied up." Defendants contend that consummation of these agreements was a mere formality and, therefore, their representation that the Mall was 50% leased was not false.
>
> The contention that eventual signature on these agreements was merely ceremonial is belied by the fact that it is not until over one year later that leases totalling the additional 44.68% were actually signed,

and, in any event, the statements made were inaccurate whatever the state of negotiations. (A39a)

Defendants close out their argument in Point III 3 with their most specious argument of all. They claim that in computing leaseable space for the Mall you have to include the department stores which anchor the Mall, Macy's and Sears. Defendants did not lease space to Macy's and Sears; both companies own their own buildings. If there was any question as to what space constituted the Mall it was resolved in the follow-

The Court: What is the Mall?

Q. Is the Mall the area between the two anchor stores?

The Court: I prefer the question what is the mall?

The Witness: What is the mall? The mall is the area between the two anchor stores. (A49)

Later, John Feist testified that Macy's and Sears were not to be included in calculating lease space at the Mall. (A 65, 66) John Kelly also testified that the Mall was the area between the two anchor stores. (A252) Indeed, the Mall by definition is the area between the two anchor stores.

POINT IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT DEFENDANTS HAD NOT ESTABLISHED THEIR DEFENSES OF LACHES AND WAIVER

In their answer, defendants raised the affirmative defenses of waiver and laches. (A26a) They argue that because plaintiff did not act to obtain rescission sooner than it did,

or move from the premises, it is not entitled to rescission. With respect to the defense of laches, a party defending has a heavy burden of proof. As one New York Court has stated:

> Where there is discretion to bar a right on the ground of delay the Statute of Limitations will be used as a guide in the exercise of such discretion.
>
> If laches be a defense, the defendants must show that extraordinary circumstances exist that require the application of the doctrine where there is no bar by limitation.
>
> It must be shown that a plaintiff was unconscionably dilatory in enforcing his rights and that as a result the position of the defendants has been altered to their substantial prejudice. . . Schoenfeld v. Chapman, 200 Misc. 444, 447, 102 N.Y.S.2d 235 (Sup. Ct. Suffolk Co. 1950), modified on other grounds 280 App. Div. 464, 115 N.Y.S. 2d 1 (2nd Dept. 1952).

Laches cannot become operative until discovery of the fraud. Because the representations made were estimates, Magnaleasing could not infer that they were fraudulent merely because actual costs were higher than estimated. Magnaleasing suspected fraud, but mere suspicions are not enough to charge a party with delay. Erbe v. Lincoln Rochester Trust Co., 3 N.Y.2d 321, 165 N.Y.S.2d 107, 144 N.E.2d 78 (1957).

Furthermore, because defendants continued to conceal the impact of their fraud by billing at a reduced rate and subsequently back billing, Magnaleasing did not know the full extent of the misrepresentations. (supra at pp 14-15) As long as a defendant continues to fraudulently conceal the fraud, he cannot charge delay. Lightfoot v. Davis, 198 N.Y. 261, 91 N.E. 582 (1910); Dodds v. McColgan, 229 App. Div. 273, 241 N.Y.S. 584 (1st Dept. 1930).

The question of whether plaintiff is barred by delay from seeking rescission is a question addressed to the discretion of the trial judge, whose decision can be reversed only for an abuse of discretion. Gardner v. Panama R. Co., 342 U.S. 29 (1951). Judge MacMahon held:

> ...The facts cannot support any claim by defendants that there was undue delay in bringing this action. After every discrepancy became known, defendants were made aware of plaintiff's objections and attempts were made to settle the dispute by negotiations.
>
> ...This action was filed on December 1974, although the extent of the defendants misrepresentations were still not completely known. There is no evidence of undue delay. We therefore do not consider whether defendants have been prejudiced. (A47a)

The record fully supports Judge MacMahon's determination. Magnaleasing protested after it received its first tax bill in August 1973; it continued to protest and attempted to resolve its problems at a meeting with Feist & Feist in May 1974; it was not informed until June, 1974 that Feist & Feist would not make any adjustments; it stopped paying the excess rent in August 1974; it was sued in September, 1974; and it brought this action in December 1974. (supra at pp. 16-17)

Defendants argue that to object and to talk settlement is not enough to relieve Magnaleasing of its duty to have commenced this action sooner. This contention totally ignores all of the above facts and the law of this state. Where a plaintiff has not acquiesced in the violation of his rights, but has merely exercised patience in commencing litigation, delay should not be a defense to the action. Pavia v. Medcalfe, 45 Misc.2d 597, 257 N.Y.S. 2d 447 (Sup. Ct. Rockland Co. 1965),

affd., 26 A.D.2nd 621, 272 N.Y.S.2nd 716 (2nd Dept. 1966); Rosenberg v. Rosenthal, 135 Misc. 282, 238 N.Y.S. 262 (Sup. Ct. N.Y. Co. 1929).

Defendants' reliance on Gannett Co., Inc. v. Register Publishing Co., 428 F. Supp. 818, (D. Conn. 1977) is misplaced. Plaintiff in Gannett was not seeking to preserve its remedy of rescission and intended to affirm the contract. 428 F. Supp. at 838. There, defendant raised the possibility of rescission and requested an early decision on cancelling the agreement, but plaintiff did not act. The court held that it had waived its rights. There is nothing in this record to indicate that Feist & Feist misunderstood Magnaleasing's position, or was in any way misled or prejudiced by Magnaleasing.

Defendants' further contention that by not vacating the premises Magnaleasing waived its right to rescission simply is not the law of New York. N.Y. C.P.L.R. §3004 (McKinney 1974), expressly provides:

> "a party who has received benefits by reason of a transaction that is void or voidable because of fraud, ...and who, in an action..., seeks rescission, ... shall not be denied relief because of a failure to tender before judgment restoration of such benefits,..."

See Nigro v. Caserta, 16 Misc.2d 355, 184 N.Y.S.2d 1001 (Sup. Ct. Kings Co. 1959).

POINT V

THE JUDGMENT SHOULD NOT BE REVERSED BECAUSE CERTAIN EVIDENCE WAS NOT ADMITTED

Defendants argue that it was reversible error not to admit John Kelly's comments on the Magnaleasing lease. The

facts show that Judge MacMahon did not exclude the lease comments from evidence. Plaintiff objected to their introduction into evidence. Judge MacMahon, however, did not sustain the objection. Rather, he asked Mr. Bergen "Is there anything here that you want to direct my attention to?" Mr. Bergen responded "I am just going to ask him a question about it, Your Honor." (A202). Judge MacMahon permitted the question. Mr. Bergen proceeded to ask the question which was answered by Mr. Kelly and then moved on to other topics. (A202) He later asked additional questions relating to the leasing comments. (A251) He was able to use the lease comments exactly as he wanted and he cannot complain that they are not in evidence.

Defendants argue, at pages 13 and 14 and in a footnote on page 50 of their brief, that the trial court committed error in excluding evidence that would have demonstrated that the fraud perpetrated on Magnaleasing would not have had as serious an economic impact if Magnaleasing's lease was different.

The essence of defendants' argument is that in computing Magnaleasing's pro rata share of common area charges and tax rent you use as a denominator all of the leased space at the Mall, i.e., 250,000 square feet. (PX 24 at E243) Some tenants, however, were able to use as a denominator all of the leasable space at the Mall, i.e., 420,000 square feet. With a larger denominator, such a tenant would pay less for common area and real estate tax charges. Defendants say that Magnaleasing would not have suffered as much if it had negotiated

better and was able to use leasable space as a denominator rather than leased space. In other words instead of paying taxes at the rate of $4.35 and $6.04 per square foot for 1974 and 1975, Magnaleasing would only have paid $3.15 and $4.87 in those years. (Defendants' Br. at 14) Whether some other tenant may have negotiated terms superior to those negotated by Magnaleasing is immaterial and the court so ruled. (A286)

Although evidence regarding leases with "leasable" and "leased" denominators was not introduced at the trial, such evidence was introduced at the damage hearing. (D174, 175, A107a, A110a) Judge MacMahon ruled on this evidence saying:

> Plaintiff suffered damages because it made payments on the basis of leased space, and those damages resulted from defendants' misrepresentations which induced plaintiff to sign the lease. Plaintiff is entitled to damages based upon the lease which it actually signed, and the monies expended as a result, not upon some hypothetical lease or expenditures. Furthermore, there would have been little difference between damages based upon leased space and those based on leasable space had the actual occupancy level been as defendants represented. Finally, 101 of the 114 leases at the Mall were entered into on a leased space basis, and, therefore, plaintiff's lease was neither unusual, nor it appears, the result of inferior bargaining. (A147a) (emhasis added)

POINT VI

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DIRECTING A REFERENCE ON DAMAGES

Waiver

Defendants contend in Point V of their brief, that the trial record contains a "paucity" of evidence as to damages,

and the district court's reference of this matter to a Special Master constituted an improper re-opening of the record to take evidence on damages. They also contend that the damage issue was insufficiently complex to warrant a reference under Rule 53 (b) of the Federal Rules of Civil Procedure. The district court held that defendants waived their objections to the reference. (A144a)

Defendants' consented to the judgment directing the reference. It was defendants who prepared the proposed order directing the reference. (supra at p. 17) Defendants participated in three conferences before the master and insisted on and obtained subtantial posttrial discovery without even objecting to the reference. (supra at p. 17) It was only when the hearings started that defendants objected. Magistrate Jacobs informed defendants at that time that it was not his function to rule on their objection. (supra at p. 18) Despite this admonition, defendants did not bring their objection to the court until after Magistrate Jacobs had awarded Magnaleasing damages and Magnaleasing moved to confirm the award. (supra at p. 18) Their objection came too late. Judge MacMahon correctly found defendants had waived their objections to the reference.

An objection to a reference must be presented to the trial court itself. Coyner v. United States, 103 F.2d 629 (7th Cir. 1939). Defendants waived their right to object by consenting to the judgment directing the reference and by failing to bring any objections to Judge MacMahon. Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), cert. denied, 424 U.S. 917 (1976).

As the Fifth Circuit stated in Cruz:

> A party objecting to a reference should do so prior to or at the time of the reference. If this is infeasible, the objection should be made to the judge at the earliest possible opportunity. 515 F.2d at 331.

Futhermore, an objection made only to the Special Master is not sufficient. As stated in First Iowa Hydro Elec. Corp. v. Illinios Gas & E. Co., 245 F.2d 613 (8th Cir.), cert. denied, 355 U.S. 871 (1957):

> ...Failure to make timely objection to the appointment of a Master either at the time of the order or promptly thereafter constitutes a waiver of error and objections made only to the Master are unavailing. Id., at 628.

Defendants misread Diamond Door Co. v. Lane-Stanton Lumber Co., 505 F.2d 1199 (9th Cir. 1974), which they cite in support of their position. There the court in holding that the objection to a reference was waived, noted as an evidentiary point that the appellant did not even raise an objection before the Master. It did not indicate that such an objection would have been sufficient to have avoided waiver. Defendants also rely on Arthur Murray, Inc. v. Oliver, 364 F.2d 28, 32 (8th Cir. 1966). There, unlike here, defendants brought their objections promptly to the trial court and petitioned in the court of appeals for an order of mandamus to prevent the reference.

The Reference was a Proper Exercise of Discretion.

The determination to direct a reference to a Special Master, is within the discretion of the trial judge. C.A.B. v. Carefree Travel, Inc., 513 F.2d 375, 381-82 (2nd Cir. 1975). There has been no showing of an abuse of that discretion. Defendants argue that the purpose of the reference was to impro-

perly reopen the record to take new evidence. The trial judge rejected this contention, holding:

> The trial record contained sufficient evidence for a computation of damages by the Special Master but, in our view, required clarification and focusing into a meaningful pattern of proof. The case was not reopened to hear new evidence on the damage issue. (A143a)

The trial record supports Judge MacMahon's conclusion. Magnaleasing sought to recover three items of damages: (1) the cost of its leasehold improvements less depreciation; (2) the difference between common area charges as represented and those actually paid, with an adjustment for normal inflationary increases; and (3) the difference between the tax rent as represented and that actually paid, with an adjustment for normal increases.

With respect to improvements, Magnaleasing sought damages calculated by depreciating the cost of permanent improvements to the Mall store. Mr. Grenesko testified at trial as to the cost of improvements and to the rate and period of depreciation. (A272, Affid. of Bannett ¶7, A121a).

With respect to taxes, Magnaleasing sought damages calculated by taking the difference between what it actually paid for taxes and what defendants represented it could expect to pay. The stipulated facts contain the information from which Magnaleasing's total tax payments can be computed. (Affid. of Bannett ¶8(a)-(f) A122a). The stipulation states the taxes per square foot paid by Magnaleasing during its lease term (Affid. of Bannett ¶8(c)-(f) A122a), the square footage of Magnaleasing's store (Affid. of Bannett ¶8(a) A122a), and the yearly percentage

increases in the New York City tax rate. (Affid. of Bannett ¶8 (g), (h) A122a, A123a) Given these figures, the damages which are the result of the tax misrepresentations can be calculated. (Affid. of Bannett ¶9 A123a)

With respect to common area charges, Magnaleasing sought damages calculated by taking the difference between the amount paid by it for common area charges and the amount represented by defendants that it could expect to pay. The stipulated facts contain the information from which Magnaleasing's total payment for common area charges can be calculated, including the amount of such charges per square foot, and that Magnaleasing paid all such charges. (Affid. of Bannett ¶¶8(f), 10, A122a, A123a). The court found that the defendants had represented its estimate of common area charges to be sixty cents per square foot per year subject to normal increases. Magnaleasing asked the court to calculate normal increases by using a 10% inflation figure derived from the United States Bureau of Labor Statistics Consumer Price Index for the New York Metoropolitan Area. John Kelley testified at trial that he expected increases to reflect the consumer price index. (A229)

This evidence was sufficiently complex to make appropriate the use of a Master in accord with Fed. R. Civ. P. 53.

Judge MacMahon also held:

> In any event, the trial judge, in his sound discretion, may reopen a case and sua sponte refer it to a Special Master to hear further evidence.
>
> Defendants have failed to make any showing of prejudice or surprise by any additional evidence, and any such evidence was received

> merely to clarify that already offered at trial. Therefore, even if the case were deemed to have been reopened, we find that the reopening was in the interest of fairness and substantial justice. (A143a)

Even on appeal defendants failed to point to anything prejudicial to them in the damage reference or any way in which Judge MacMahon abused his discretion. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, (1971) In fact, defendants used the reference to introduce evidence to reduce the amount of damages by disputing the normal increase in common area charges, something defendants had failed to do at trial.

Summary

In August 1972, Irving and John Feist were warned by their controller that the Mall might not be economically feasible for the tenants. They did not call for an immediate review of the economic viability of the project, but instead they embarked on a compaign of deception to obtain tenants, without any regard for the losses which those tenants would have to sustain. Advertising brochures were printed giving glowing accounts of the leasing progress at the Mall; fraudulent leasing plans were prepared and imprinted with the names of nonexistent tenants; and false estimates were provided to tenants with full knowledge that they would rely on them. Feist & Feist was confident that the tenants would not learn of its deception because it alone knew the percentage of space leased at the Mall and it alone had the information on which to base estimates of costs.

Feist & Feist knew that the tenants could not bear

the enormous costs which it had truly estimated. But this knowledge, recorded in a secret memorandum, was never communicated to the unsuspecting tenants. John Feist predicted trouble with the tenants when they learned the true state of affairs and, indeed, he was right. To temper this trouble, however, Feist & Feist continued its fraudulent scheme. It did not bill the tenants for their actual share of common area charges and real estate taxes until many months after the charges were incurred. Furthermore, the scheme did not end in Staten Island. John Feist brought it into this courthouse. His behavior on the stand compelled Judge MacMahon to say "I am not impressed with your evasions."

Magnaleasing has proved by clear and convincing evidence that it has been defrauded.

Conclusion

The judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

George R. Lefayt, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 175 West 87 th St Apt 23C.

That on the 8 day of August, 1977, deponent personally served the within BRIEF FOR APPELLEE MAGNALEASING, INC.

upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

MARSHALL BRATTER GREENE ALLISON + TUCKER
ATTORNEYS FOR DEFENDANTS - APPELLANTS
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NEW YORK, N.Y.

George R. Lefayt

Sworn to before me this
8th day of August, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979